IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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| DONALD J. BEARDSLEE,<br><br>Petitioner-Appellant<br><br>v.<br><br>JEANNE S. WOODFORD,<br>Director of the Department of Corrections,<br>JILL L. BROWN, Warden<br>And Does 1-50<br><br>Respondents-Appellee | CA # 05-15042<br>DC # C 04-5381 JF<br><br>EXECUTION IMMINENT: 1/19/05 |

# APPELLANT'S OPENING BRIEF

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

HONORABLE JEREMY FOGEL
United States District Judge

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## I. JURISDICTIONAL STATEMENT

Appellant Donald J. Beardslee is confined on death row at San Quentin State Prison. On January 19, 2005, Mr. Beardslee is scheduled to die by lethal injection. This appeal is from an order entered on January 7, 2005, denying a preliminary injunction.

The district court had jurisdiction over this question pursuant to 28 U.S.C. Section 1331 (federal question jurisdiction). This action arises under the First, Eighth and Fourteenth Amendments to the United States Constitution and under 42 U.S.C. Section 1983. This Court has jurisdiction over this action pursuant to 28 U.S.C. Section 1292 (appeals from interlocutory orders denying injunctions).

The appeal is timely. The district court entered its order on January 7, 2004. (ER 670.)[1] Appellant timely filed his notice of appeal that same day. (ER 742.)

## II. ISSUES PRESENTED FOR REVIEW

1. Eighth Amendment Claim: Whether the District Court abused its discretion in refusing to preliminarily enjoin the State from executing appellant under its current protocol in light of the demonstrated risk that the protocol would subject appellant to an unacceptable level of pain.

2. First Amendment Claim: Whether the District Court abused its discretion in refusing to preliminarily enjoin the State from administering pancuronium bromide, a paralyzing neurotoxin that would prevent appellant from communicating that

[1] ER=Excerpts of Record.

he had been properly sedated and was experiencing torturous pain.

## III. STATEMENT OF THE CASE

On November 24, 2004, appellant began exhausting his administrative remedies as required by the Prison Litigation Reform Act. He filed two inmate appeals on CDC Form 602 alleging that California's lethal injection procedure violated his rights under the First and Eighth Amendment. (ER 642.) On December 6, 2004, respondent Warden denied both of appellant's appeals. (ER 669.) On December 8, 2004, appellant submitted his First and Eighth Amendment appeals to respondent Director for Third Level review. On December 12, 2004, respondent Director denied both of appellant's appeals. The denial stated that appellant had exhausted his administrative remedies within the Department of Corrections. (ER 651.)

On December 16, 2004, the San Mateo County Superior Court set appellant's execution for January 19, 2005. Appellant's petition for executive clemency is currently pending in the Governor's office.

On December 20, 2004, appellant filed a two count complaint in this action. Count one stated an Eighth Amendment claim, alleging that in light of the numerous demonstrated problems that have occurred in lethal injection executions in California and other states, appellant was at great risk to experience a constitutionally unacceptable level of pain and psychological suffering during his execution. Count two stated a First Amendment claim, alleging that the administration of pancuronium bromide, a paralyzing neurotoxin, would violate appellant's First Amendment rights in

the event that he was not properly sedated by preventing him from communicating that he was being tortured. (ER 1.)

With the complaint, appellant filed a motion for preliminary relief and a motion for expedited discovery and to compel production of documents. (ER 14, 474.) In the motion for preliminary relief, appellant requested that a hearing be set for December 23, 2004. (ER 21.) The case was assigned to the Honorable Jeremy Fogel. Because Judge Fogel was on vacation for the holidays, the hearing was set for January 6, 2005.

Following argument, Judge Fogel denied preliminary relief on January 7, 2005. Appellant filed his notice of appeal on January 10, 2005.

## IV. STATEMENT OF FACTS

### A. Facts Related to Appellant's Eighth Amendment Claim

The State of California adopted lethal injection as an alternative to lethal gas executions in 1992, after Daniel Vasquez, the former warden of San Quentin, consulted with officials from Texas regarding their lethal injection procedure. Warden Vasquez adopted a similar protocol as Texas' even though he witnessed the botched execution of Justin Lee May, who gasped and coughed before his body froze, and was aware of the Texas execution of Billy Wayne White, who, after 45 minutes had to help the executioners fine a vein: in his scrotum. (ER 190-98.)

California's procedure was adopted without consulting any medical professionals to ensure that this method was humane. Like Texas, California's lethal

injection protocol calls for the use of three drugs: sodium pentothal[2], a fast-acting barbiturate of short duration; pancuronium bromide, a neuromuscular blocking agent, and potassium chloride, an extremely painful chemical which activates the nerve fibers lining the prisoner's veins and interferes with the heart's contractions, causing cardiac arrest (ER 68.) Potassium chloride, the third drug administered under Procedure 770, causes a rapid cessation of the heartbeat and relatively quick death thereafter. (ER 68.) Pancuronium bromide serves no purpose when administered prior to the potassium chloride as it does not result in the prisoner's death under this protocol. (ER 66, 69.)

Pancuronium bromide operates by attaching to the receptor sites in voluntary muscle tissue to prevent, or "block" nerve signals from interacting with the muscle tissues. It therefore renders these muscles, which include those lining the chest cavity, unable to contract but it does NOT stop the heart muscle from working. Nor does it affect the brain or nerves. By affecting the muscles in the chest as well as the diaphragm, it causes asphyxiation and suffocation, though by no means quickly. If a person is not properly anesthetized when injected with pancuronium bromide, he will remain conscious while being completely paralyzed. He will experience the physical agony of asphyxiation and the psychological agony of desperately wanting to breathe but being unable to. The person will be absolutely unable to communicate with anyone about the fact that he is conscious either verbally or with any body movements. (ER 63, 66-68.)

[2] Sodium pentothal is the brand name for the drug Sodium Thiopental

1. Evidence of Problems That Have Occurred in California Lethal Injections.

On February 23, 1996, William Bonin became the first person in California to be executed by lethal injection. It took the execution staff 27 minutes to insert the IV tube. The log indicates that that the EKG monitor was not working properly, and that Bonin had irregularities in his heart and breathing. Also, inexplicably, a second administration of pancuronium bromide was ordered a minute after the first was administered. (ER 127, 64.)

On May 3, 1996, Keith Daniel Williams was executed by lethal injection. Again, there were delays caused by problems inserting the IV tubes. (ER 128.)

On February, 9, 1999, Jaturun Siripongs was executed by lethal injection. Newspaper reports indicate that Siripongs head tilted back after the pancuronium bromide was administered, and then he twitched several times, gasped for air, and his diaphragm continued to heave intermittently until he was pronounce dead. (ER 218.) It took eight minutes for him to die after the potassium chloride was administered. (ER 129.)

On May 4, 1999, Manuel Babbitt was executed by lethal injection. A minute after the pancuronium bromide was administered, the execution log shows that he had shallow respirations and brief spasmodic movements of his upper abdomen. His heart remained at a steady rate of 95 to 96 beats per minute until the potassium chloride stopped his heart. (ER 130.) As appellant's expert explains, the steady heart rate

indicates that Babbitt was conscious when both the pancuronium bromide and potassium chloride hit his system. (ER 64-65.)

On January 29, 2002, Stephen Wayne Anderson was executed, the last person executed by lethal injection in California to date. The man who attempted to secure the main IV had a difficult time and caused significant bleeding. The execution took over a half hour to complete. Anderson's attorney, Margo Rocconi, witnessed the execution and reported that his "chest and stomach heaved more than 30 times" Newspaper accounts of journalists who witnessed the execution reported similarly. (ER 132-34, 212-16.) According to appellant's expert, this indicates that Anderson was not fully sedated prior to the administration of the pancuronium bromide and was struggling against the paralytic effects of the drug. (ER 63-64.)

2. Critical Omissions in and Problems With California's Lethal Injection Protocol.

There are numerous critical omissions in and problems with Procedure 770. (ER 83-121.)

- The minimum qualifications and expertise required for the different personnel performing the tasks in involved in the lethal injection procedure, beginning with the insertion of the catheter are not specified. (ER 70.)

- The methods for obtaining, storing, mixing, and appropriately labeling drugs, particularly sodium thiopental, which is a controlled substance are

not specified. (ER 70.)

- The minimum qualifications and expertise required for the person who will determine the concentration and dosage of each drug to give, and the criteria that shall be used in exercising this discretion are not specified. (ER 70.)

- The manner in which the IV tubing, three-way vale, saline solution and other apparatus shall be modified or fixed in the event it is malfunctioning during the execution process are not specified. (ER 71.)

- The minimum qualifications and expertise required of the person who shall have the discretion to decide to attempt such action, and the criteria that shall be used in exercising this discretion are not specified. (ER 70.)

- The manner in which the prisoners heart shall be monitored and by whom prior to death being pronounced are not specified, nor are any provisions regarding who should attempt to fix any heart monitoring device should there be a malfunction.

- The timing for the administration of the drugs is not specified and has varied from execution to execution. (ER 70.)

- The manner in which the prisoner is determined to be properly sedated prior to the injection of the Pancuronium bromide and the minimum

qualifications for the person who shall make this determination are not specified. (ER 66-67, 70.)

- Pancuronium bromide interferes with the ability to monitor a person's degree of unconsciousness.

- The manner in which the IV catheters shall be inserted into the prisoner, including what size angiocath should be inserted are not specified.

- The minimum qualifications and expertise of the person who shall insert the angiocath and determine which size angiocath is needed, and the criteria that shall be used in exercising this discretion are not specified. (ER 70.)

- The manner by which any other medical procedure or emergency shall be handled during the execution process, including whether a "cut-down" procedure shall be performed is not specified. (ER 70, 73.)

- The minimum qualifications and expertise of the person who shall perform such procedures and determine whether the procedures are necessary, and the criteria that shall be sued in exercising this discretion are not specified. (ER 70, 73.)

- Procedure 770 fails to account for the individual prisoner's medical history, differing body weights, tolerance to anesthetics, allergic reactions, past

exposure to alcohol or addictive drugs, and other factors which may determine the difficulty of inserting an angiocath properly into the prisoner.

- Procedure 770 fails to take into account a condemned prisoner's stress or fear during the execution, which may make proper insertion of the angiocath more difficult. (ER 62.)
- Procedure 770 provides for no monitoring of the flow of the fluids into the prisoner's vein. (ER 70.) Proper monitoring requires a clear view of the IV site and often requires a "palpitation" or touch of the site to check for skin temperature and firmness of the surrounding tissue. Infiltration or diversion of the fluid away from the vein could occur without being detectable by the eye. There is no indication that anyone involved in the execution process is trained in this process. (ER 70.)
- Procedure 770 explicitly states that after the IV is started, all personnel leave the chamber. With all personnel behind closed doors, monitoring the flow of drugs and making sure that the prisoner is properly anesthetized is virtually impossible. (ER 69.)
- The risk of improper flow, blockage or leakage of chemicals is multiplied by the fact that, because the operation of the injection is so far away from the prisoner, extension sets of tubing are needed between the tubes inserted into the prisoner and the tubes inserted to the apparatus that releases the drugs. (ER 69-70.)

- If the sodium pentothal comes into contact with pancuronium bromide, the sodium pentothal will crystallize out of solution and become ineffective. This is known to have occurred in executions in other states. (ER 231-32.)
- Procedure 770 also calls for a modification of the neoprene diaphragm on the "Y" injection site for insertion of syringe tips instead of a needle. There is no mention that this is a medically approved procedure and further creates the risk of improper flow of chemicals into the prisoner. (ER 71.)
- Procedure 770 creates a risk that the anesthetic will not be properly metabolized by allowing the prisoner to ingest Valium or a similar sedative, which interferes with the ability of sodium pentothal to act as a proper sedative. (ER 62.)
- Procedure 770 calls for a saline flush between the administration of pancuronium bromide and potassium chloride. This unnecessary procedure increases the risk of improper administration of the lethal injection. (ER 72.)
- The manner by which the lethal injection procedure can be safely halted once it has started for any reason, such as a stay of execution or a reprieve from the Governor, is not specified. (ER 72.)
- The minimum qualifications and expertise of the person who shall perform the procedures necessary to halt the execution and preserve the

prisoner's life are not specified. (ER 72-73.)

3. Evidence From Toxicology Reports Showing That Inmates Have Been Conscious During Lethal Injection Executions Conducted in Other States.

According to Dr. Dershwitz, respondents' expert in *Cooper*, most people would be rendered unconscious by approximately 13 mcg/ml (mcg/ml is the same as mg/L) of sodium thiopental in their blood, meaning that the two grams of pentothal administered during lethal injections in Kentucky, North Carolina, and South Carolina, and the 5 grams administered in California and Arizona, is sufficient to render a person unconscious (assuming that the it reaches the person's bloodstream). (ER 237.) Dr. Dershwitz submitted a graph in *Cooper* that determines the likelihood of consciousness based upon the concentration of thiopental in the bloodstream. (ER 257.)

Although no toxicology or autopsy reports exist for prisoners who have been executed by lethal injection in California, they exist for prisoners executed in many states. Appellant's expert, Dr. Heath, reviewed these reports. He concedes that a give gram dose of sodium thiopental, *properly administered*, will properly sedate a condemned man for the duration of his execution. He opines that, based on the assumptions of *respondents' expert* and given the extremely low levels of sodium pentothal found in the prisoners' blood post-mortem, there is a strong likelihood that these individuals were conscious during the administration of potassium chloride and suffered extreme and unnecessary pain as a result. (ER 62-63, 65-66.)

- **North Carolina toxicology results.**

When North Carolina executed Desmond Keith Carter, the Medical Examiner ascertained that Mr. Carter's blood contained only "trace" amounts of thiopental. (ER 158.) Assigning 2.6 mg/L for "trace amounts" and plotting this value on Dr. Dershwitz's Exhibit C produces a probability of consciousness for Mr. Carter of 100%. (ER 157.) In the same fashion, plotting the 2.6 mg/L of thiopental found in Mr. Arthur Martin Boyd's blood also produces a 100% probability of consciousness. See (ER 159-60.) Plotting Michael Earl Sexton's thiopental blood value of 3.7 mg/L, (ER 162,) produces a 100% probability that he was conscious. (ER 161.) Plotting Ronald Wayne Frye's thiopental blood value of 8.2 mg/L, (ER 164,) produces a 40% probability that he was conscious. (ER 163.)

- **South Carolina toxicology results.**

One out of four people executed by lethal injection in South Carolina were conscious during the process. There was a 50% probability that Larry Gilbert (thiopental blood level 7.1 mg/L ) (ER 175;) Louis Truesdale (thiopental blood level 7.5 mg/L) (ER 179;) and Richard Johnson (thiopental blood level 7.8 mg/L) (ER 182;) were conscious when injected with Pancuronium Bromide and Potassium Chloride. Michael Passaro, thiopental level 6.1 mg/L (Exhibit I-6, Toxicology Report of Michael Passaro), Ronald Howard, where virtually NO thiopental level was detected in his blood (ER 186;), and Kevin Dean Young, thiopental level 3.4 mg/L (ER 167;) had a greater likelihood of consciousness during their executions. There was a 100%

probability that Mr. Howard and Mr. Young were conscious throughout their executions. (ER 185-86.) There was a 90% probability that Michael Passaro was conscious throughout his execution. (ER 170.)

- **Kentucky toxicology results**

Edward Harper was the first person executed by lethal injection in Kentucky. Toxicology reports show that there is between a 67% and a 100% likelihood that Harper was fully conscious when the Pancuronium bromide and potassium chloride ravaged his organs.

After Harper's execution, the Medical Examiner's Office took blood samples from three locations in his body: two locations in the vein, and one in the heart. (ER 137.) The thiopental level in the heart was 6.5 mg/L, approximately twice the concentration of the blood. (ER 147-49.) The heart blood thiopental level indicates approximately a 67% likelihood of consciousness. (ER 152.) The 3 mg/L of thiopental from the other two blood draws indicates a 100% probability of consciousness. (ER 150-51.) Dr. Dershwitz himself, when informed of Mr. Harper's thiopental levels in his post-mortem toxicology reports, called this evidence "potentially troubling", noting that "the blood level should be a lot higher than seven" mg/l. (ER 225.)

According to the toxicology reports, the Pancuronium bromide concentration in Harper's blood was 18 mg/L in the right axilla, 30 mg/L in the vena cava, and 39 mg/L in the heart. (ER 147-49.) Kentucky, like California, administers

50 mg/L of Pancuronium bromide. (ER 154.) One would expect that the same percentage of thiopental would be in Harper's bloodstream as there was pancuronium bromide. Instead, the concentration of thiopental in Harper's bloodstream was a miniscule fraction of the concentration administered, proving that the full two grams of thiopental never reached Harper's bloodstream, while a relatively large dose of Pancuronium bromide did. Therefore, it is virtually certain that Harper consciously felt the excruciatingly painful effect of Pancuronium bromide and potassium chloride ravaging his internal organs.

- **Arizona toxicology results**

Twenty people have been executed by lethal injection in Arizona. Of these prisoners, 7 of them have had toxicology reports stating the level of sodium pentothal found in the bloodstream. (ER 289, 299, 301, 303, 304, 307.) Of these 7 individuals, three of them: Anthony Chaney, John Brewer, and James Clark, had a 100% chance of being conscious during the execution. Another three, Jimmie Jeffers, Jose Ceja, and Ignacio Ortiz, show approximately a 70% to 80% chance of being conscious during the execution. Only one prisoner, Louis Mata, was likely to be unconscious during the entire execution process. The Arizona reports are particularly significant because, according to Dr. Heath, who has reviewed the Arizona lethal injection protocols, Arizona administers 5 grams of sodium pentothal to the condemned prisoner—the same amount as California. (ER 65.)

4. Reports of Problems That Have Occurred in Lethal Injection Executions in Other States.

When Stephen McCoy was executed in Texas, he reacted violently to the drugs; his chest heaved, he gasped for air, and appeared to be choking. (ER 228-29.) Numerous other similar incidents have been documented, many also from Texas. ER 231-33.)

Other problems that have been noted include:

- inmate fully conscious and complaining of pain for ten minutes when chemicals reacted together and clogged catheter. (ER 231.)
- inmate's catheter pops out and sprays chemicals around the room. Twenty-four minutes lapsed before the inmate died. (ER 231.)
- inmate suffers prolonged death due to kink in the catheter line. (ER 232.)
- inmate's abdomen muscles spasm for almost a minute, and he appears to choke as he takes eleven minutes to die . (ER 232.)
- inmate goes into coughing spasm, gasps and chokes. (ER 232.)
- inmate's catheter clogs when first two drugs reach together. (ER 232.
- Inmate's death prolonged because leather straps too tight to allow blood to flow freely through his system. (ER 233.)

5. Evidence That Most of California's Execution Protocol Would Be Unacceptable to Euthanize Domestic Animals.

Under California law, the personnel involved in euthanizing animals are provided more guidance and training than those involved in the execution of human

prisoners. Only under the following circumstances may an individual other than a veterinarian or registered veterinary technician euthanize an animal with a barbiturate similar to sodium pentothal:

> "(a) In accordance with section 4827(d) of the Code, an employee of an animal control shelter or humane society and its agencies who is not a veterinarian or registered veterinary technician (RVT) shall be deemed to have received proper training to administer, without the presence of a veterinarian, sodium pentobarbital for euthanasia of sick, injured, homeless or unwanted domestic pets or animals if the person has completed a curriculum of at least eight (8) hours as specified in the publication by the California Animal Control Directors Association and the State Humane Association of California entitled "Euthanasia Training Curriculum" dated October 24, 1997, that includes the following subjects:
>
> (1) History and reasons for euthanasia
>
> (2) Humane animal restraint techniques
>
> (3) Sodium pentobarbital injection methods and procedures
>
> (4) Verification of death
>
> (5) Safety training and stress management for personnel
>
> (6) Record keeping and regulation compliance for sodium pentobarbital
>
> At least five (5) hours of the curriculum shall consist of hands-on training in humane animal restraint techniques and sodium pentobarbital injection procedures.
>
> (b) The training curriculum shall be provided by a veterinarian, an RVT, or an individual who has been certified by the California Animal Control Directors Association and the State Humane Association of California to train persons in the humane use of sodium pentobarbital as specified in their publication entitled "Criteria for Certification of Animal Euthanasia Instructors in the State of California" dated

September 1, 1997. 16. Cal. Admin. Code § 2039.

Unlike the personnel mentioned in Procedure 770, veterinarians and those trained by them to perform animal euthanasia have specific requirements and guidance regarding using lethal injection in euthanasia. The American Veterinary Medical Association [AVMA], in it's 2000 Report of the Panel on Euthanasia, makes the following caution when personnel are using a barbiturate and potassium chloride, the same drug used in Procedure 770, in animal euthanasia

> "It is of utmost importance that personnel performing this technique are trained and knowledgeable in anesthetic techniques, and are competent is assessing depth appropriate for administration of potassium chloride intravenously. Administration of potassium chloride intravenously requires animals to be in a surgical plane of anesthesia characterized by loss of consciousness, loss of reflex muscle response, and loss of response to noxious stimuli." (ER 2-9.)

The AVMA absolutely prohibits the use of curariform substances such as pancuronium bromide. (ER 210.)

In 1981, states began banning neuromuscular agents as a means of euthanizing animals. Currently, at least nineteen states have passed laws that either expressly or implicitly preclude the use of a sedative in conjunction with a neuromuscular blocking agent. The states that expressly forbid such practice (thiopental in combination with pancuronium bromide) are the following: Florida, Fla. Stat. §§ 828.058 and 828.065 (enacted in 1984); Georgia, Ga. Code Ann. § 4-11-5.1 (enacted in 1990); Maine, Me.Rev.Stat. Ann. tit. 17, § 1044 (enacted in 1987); Maryland, Md.Code Ann., Criminal Law, § 10-611 (enacted in 2002); Massachusetts, Mass.Gen.Laws §

140:151A (enacted in 1985); New Jersey, N.J.S.A. 4:22-19.3 (enacted in 1987); New York, N.Y.Agric. & Mkts § 374 (enacted in 1987); Oklahoma, Okla. Stat., Tit. 4, § 501 (enacted in 1981); Tennessee, Tenn.Code Ann. § 44-17-303 (enacted in 2001); and, Texas, Tex. Health & Safety Code, § 821.052(a). The following states implicitly ban such practices.; see Connecticut, Conn. Gen.Stat. § 22-344a; Delaware, Del.Code Ann., Tit. 3, § 8001; Illinois, 510 Ill. Comp. Stat., ch. 70 § 2.09; Kansas, Kan. Stat. Ann. § 47-1718(a); Kentucky, K.R.S. section 312.181 (17) and KAR 16:090 section 5(1); Louisiana, La. Rev. Stat. Ann. § 3:2465; Missouri, 2 CSR 30-9.020(F)(5); Rhode Island, R.I. Gen. Laws § 4-1-34; and, S.C. Code Ann. § 47-3-420; (*See also*, ER #). Furthermore, in 2000, the leading professional association of veterinarians, the American Veterinary Medical Association, promulgated guidelines for euthanasia, which stated that use of a sedative with a neuromuscular blocking agent "is not an acceptable euthanasia agent." (ER 207.)

B. Facts Related to Appellant's First Amendment Claim

The effectiveness of California's lethal injection protocol and protocols similar to it around the country is a current public controversy. Appellant has educated himself about the lethal injection controversy. Appellant is convinced that he will be awake and conscious to experience the burning torture of a lethal injection of potassium chloride. (ER 647.)

If appellant's execution goes forward, and in the event that he has not been properly anaesthetized, he wants to be able to communicate that fact and the fact that he

is experiencing excruciating pain. Appellant wants to communicate this information so that defendants, the Governor, the Legislature, the public and those acting on behalf of other death row inmates can evaluate whether California's execution protocol violates the Eighth Amendment prohibition against cruel and unusual punishment. (ER 647.)

Appellant also wants to communicate the information that the execution protocol failed in his particular case so that 1) the public can be educated about the procedure's very real possibility for torturing the condemned, and 2) defendants can be alerted to the failure so that they can identify where the system broke down in order to ensure that the mistake is not repeated in future executions. (ER 647.)

The administration of pancuronium bromide during the execution procedure will paralyze appellant's voluntary muscles. If appellant is not properly anesthetized, he will be unable to speak or move, and he will be unable to communicate the fact that he has not been properly anaesthetized and that he is experiencing excruciating pain. (ER 63, 68.) Respondents have conceded this point. (ER 542.)

The third drug, potassium chloride, is the drug that is intended to cause the inmate's death. (ER 66, 68, 69.) In their opposition papers, respondents did not explain how pancuronium bromide plays a constitutionally acceptable role in the execution process, and they did not identify any other possibly legitimate penological purpose justifying use of the drug. (ER 535.)

## V. SUMMARY OF ARGUMENT

### A. Timeliness

Appellant could not have filed these claims earlier. Unlike Kevin Cooper, appellant filed a fully exhausted claim as the Prison Litigation Reform Act requires. Title 15 section 3084.3(c)(3) of the California Code of Regulations does not allow an inmate to challenge anticipated actions. Therefore, appellant could not have exhausted earlier than he did. Additionally, in *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998) the U.S. Supreme Court has held that claims relating to the conduct of an execution are not ripe until the execution is imminent and the circumstances to be litigated are settled.

### B. Eighth Amendment

Using the Kevin Cooper case as the benchmark for ruling on appellant's motion was an erroneous legal premise. To the extent *Cooper* was relevant, appellant showed why, factually and legally, *Cooper* was wrongly decided.

Further, while some of appellant's evidence was identical to Cooper's, Cooper questioned whether a single dose of five grams of thiopental would properly sedate someone. By contrast, appellant, *like respondent's expert*, assumes that five grams of sodium thiopental, properly administered, would result in a humane execution. In accordance with other cases where the specific execution procedures and the qualifications, training and background of those performing the procedures have been deemed relevant, appellant argued that California's protocol does not ensure proper administration and delivery of the drugs and that this is why there have been problems

in California executions. Given these differences, the district court abused its discretion in assuming that because Cooper's presentation fell short, appellant's also must fail.

Appellant submitted four execution logs from California executions, as well as a declaration from a witness to the Stephen Anderson execution. Appellant's expert, a professor of anesthesiology at Columbia University, opined that the biological data and behavior noted in these exhibits strongly suggest that the condemned men were conscious when the potassium chloride hit their systems. Respondents' expert did not address the significance of the execution logs in his declaration in *Cooper*, and respondents presented no evidence on the subject here.[3]

Appellant also presented toxicology reports from other states. These reports were not available to Kevin Cooper. They represent new evidence on the effectiveness of drug delivery during the lethal injection execution. The information on these reports strongly suggest that, according to the premises of *respondents' expert*, that the men executed were conscious when the pancuronium bromide and potassium chloride were administered. Given that respondents' expert has deemed such evidence "potentially troubling," (ER 225,) the district court abused its discretion in failing to consider it.

The district court relied on argument by the Attorney General and its decision in *Cooper*, not evidence or case law. Thus, the district court's factual findings are clearly erroneous and an abuse of discretion.

[3] Notably, respondents have refused appellant's request for information that might fill in the numerous blanks in the protocol that are causes for concern.

The district court also committed substantive legal error. Although claiming to place great weight on its own decision in *Cooper*, a case that did not address proper administration and delivery of the drugs, the district court did not cite a single Eighth Amendment case that it had previously relied on. Appellant had shown in his reply brief why *every single case* that the court had cited in *Cooper* was inapt. Instead, the district court reached out to a *Virginia* district court case for the proposition that the risk of error in *California's* lethal injection procedure was minimal. The error was compounded by the fact that the Virginia court expressly stated that it was considering only a facial challenge to Virginia's three-drug protocol and that it deemed issues about procedural safeguards and the qualifications and training of the personnel conducting the execution to be irrelevant.

C. First Amendment

If the inmate is not rendered unconscious by the sodium thiopental, the second drug in the protocol, pancuronium bromide, the paralyzing neurotoxin, prevents the conscious and suffocating inmate from communicating about the torturous pain he is experiencing from the third and fatal drug, potassium chloride. The First Amendment guarantees appellant's right to communicate in this manner.

The district court erroneously held that before his First Amendment protections could be triggered, appellant had to demonstrate some unspecified likelihood that an accident would occur and that he would be conscious and suffering. This essentially erroneous legal premise, if upheld, would render this Court's holding in

the *First Amendment Coalition* case a nullity. Appellant did not have to bear this burden any more than the appellants in the *First Amendment Coalition* case had to prove that there would probably be something newsworthy to write about if the curtain at issue was removed. Indeed, as was clear from that case, the record established that the curtain was closed because things could happen in the process that would inspire criticism. Pancuronium bromide is administered for the same reason.

In *California First Amendment Coalition v. Woodford*, 299 F.3d 868, 876 (9th Cir. 2002), this Court recognized that the public has a First Amendment right to view the process by which the state puts prisoners to death. This Court emphasized that humane execution policy cannot be rationally formulated without the media, the public and, by extension, our elected and appointed decision makers having first-hand information about how executions are conducted and any problems that may occur. A viewer implies that there will be something to see; a listener implies a speaker. Pancuronium bromide operates as a chemical veil to prevent the inmate from crying out and communicating the truth about what is being done to him.

Respondents did not address appellant's showing under *Turner v. Saffley*, 482 U.S. 78 (1987), the Supreme Court case that sets out the elements for vindicating constitutional rights in a prison setting. They made no showing that pancuronium bromide is administered for a legitimate penological purpose, nor could they given that this Court has held that conscious asphyxiation—which appellant would be subject to if the first drug was not effectively delivered—is an Eighth Amendment violation.

Even assuming the district court was correct and appellant could claim no First Amendment right unless he established some probability that the protocol would fail, he more than met his burden. The district court's finding to the contrary was clearly erroneous and an abuse of discretion.

## VI. ARGUMENT

### A. Standard of Review

A party seeking injunctive relief in the Ninth Circuit must meet one of two tests. Under the first test, a court may issue a preliminary injunction when it finds: (1) a substantial likelihood that appellant will prevail on the merits; (2) a substantial threat that the appellant will suffer irreparable injury if the injunction is not granted; (3) that the threatened injury to the appellant outweighs the threatened harm the injunction may do to respondent; and (4) that granting the preliminary injunction will not disserve the public interest. *Martin v. International al Olympic Comm.*, 740 F.2d 670-674-75 (9th Cir. 1984) (citing *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 526 F.2d 86. 87 (9th Cir. 1975)).

Under the second test, a court may issue a preliminary injunction if the moving party demonstrates either (1) a combination of probable success on the merits and the possibility of irreparable injury; or (2) that serious questions are raised and the balance of hardships tips heavily in the moving party's favor. *Martin, supra* at 675. The purpose of a preliminary injunction is to preserve the *status quo* pending the

outcome of litigation. *Regents of the Univ. of California v. ABC, Inc.*, 747 F.2d 511, 514 (9th Cir. 1984).

Appellate review of an order denying a preliminary injunction is deferential but not toothless.

> "We may not reverse the district court's denial of the preliminary injunction unless the district court abused its discretion or relied on an erroneous legal premise. *Sports Form, Inc. v. United Press International, Inc.*, 686 F.2d 750, 752 (9th Cir. 1982) *(Sports Form); Los Angeles Memorial Coliseum Commission v. National Football League*, 634 F.2d 1197, 1200 (9th Cir. 1980). We must therefore determine whether "the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment," *Sports Form*, 686 F.2d at 752, *quoting Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416, 28 L. Ed. 2d 136, 91 S. Ct. 814 (1971), as well as whether the district court followed the appropriate legal standard governing the issuance of preliminary injunctions, or misapprehended the law with respect to the underlying issues in applying those standards. *Sports Form*, 686 F.2d at 752, *Wright v. Rushen*, 642 F.2d 1129, 1132 (9th Cir. 1981)." *Martin v. International al Olympic Comm.*, 740 F.2d 670-674-75 (9th Cir. 1984)

Abuse of discretion occurs when the district court rests its conclusions on clearly erroneous findings of fact. *Sports Form* at 752. *See Buchanan v. United States Postal Service*, 508 F.2d 259, 267 n.24 (5th Cir. 1975); *Unicon Management Corp. v. Koppers Co.*, 366 F.2d 199, 203 (2d Cir. 1966). A finding of fact is clearly erroneous when "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S. Ct. 525, 542, 92 L. Ed. 746 (1948).

B. The District Court Relied on Erroneous Legal Premises and Abused Its Discretion in Factoring The Timing of the Lawsuit into its Decision to Deny Preliminary Relief.

The district court acknowledges that appellant filed a fully exhausted claim. (ER 672.) It places undue weight on the fact that appellant filed suit four days after the superior court set an execution date. (*Ibid.*) The court ignores the fact that appellant began to exhaust his administrative remedies on November 24, 2004, two days after the California Supreme Court lifted the stay of proceedings to set an execution date and three weeks before the December 16 hearing. (ER 653, 656.) If, as the district court held in dismissing Cooper's action in October (ER 672, n.1,) exhaustion of claims challenging aspects of the method of execution is truly required, then appellant cannot be penalized for following California's scheme for exhausting his administrative remedies.[4]

The Department of Corrections does not permit challenges to "anticipated action[s]." 15 CCR § 3084.3(c)(3). While this arguably makes little sense because an executed inmate cannot challenge his execution after it has occurred, the district court did not see it that way when it dismissed Cooper's case for want of exhaustion. Attempting to fit the regulation to the context suggests that an inmate would be prevented from filing any administrative challenge before his appeals had been

[4] Respondent Director's response to the appeal suggests that perhaps exhaustion should not be required. Although respondent Director denied the claim on the merits, she also stated, "The appellant's sentence and penalty were established by court in California; therefore, relief at the Director's Level of Review cannot be afforded the appellant." (ER 651.) This is plainly not true since the precise lethal injection method was not established by court (or statute). However, if that is the position the Director is going to take, it suggests that exhaustion of this type of claim is an idle act that should not be required.

exhausted and the state was able to move forward with setting an execution date. It could even prevent him from exhausting until the date had been set, the warrant had been read and the inmate had declined after ten days to select an execution method. Under this reading, exhaustion arguably was not appropriate until December 28, the first business day after the ten-day period.

Had appellant brought this section 1983 action a year or two ago[5], it almost certainly would have been dismissed as unripe. Respondents surely would have argued that a section 1983 claim with strong evidentiary support was not ripe.[6] *Cf. Campbell v. Wood*, 18 F.3d 662, 680-81 (9th Cir. 1994) (Washington officials unsuccessfully argued that Eighth Amendment habeas challenge to default execution method of hanging was not ripe because inmate ultimately could choose lethal gas).

In *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998), the U.S. Supreme Court stated that an inmate's competency-to-be-executed claim was properly dismissed as unripe because "his execution was not imminent and therefore his competency to be executed could not be determined at that time." *Id.* at 644-45. The Court held that the inmate's claim was "unquestionably ripe" only after it was clear that he "would have no federal habeas relief for his conviction or his death sentence, and the Arizona Supreme

[5] Plaintiffs in section 1983 actions are not entitled to counsel. It is hard enough for counsel to gather the information needed to prove these cases, as the Attorney General's refusal to produce relevant documents even with a protective order indicates. (ER 478-88.) A *pro se* death row inmate would have no chance. There is little incentive for private counsel to take section 1983 cases on contingency (for statutory fees) while the inmate still has habeas claims pending which, if successful, would moot counsel's work.

[6] Respondents may argue that they are happy to litigate lethal injection challenges in habeas petitions early in the process in the California Supreme Court. Given respondents' success record in that Court and the potential for an AEDPA bar, this argument deserves no credence here.

Court issued a warrant for his execution." *Id.* at 643. Appellant submits that the likelihood of California modifying its execution protocol over time is more likely than that of an incompetent inmate being restored to competence. Thus, appellant was entitled to wait until his habeas claims were exhausted, the warrant had issued and the manner in which his execution would be conducted was clear. Further, this Court has held that a petitioner challenging a method of execution lacks standing to make a challenge under § 1983 until he chooses his method of execution.

> "Because neither plaintiff has chosen lethal gas as his method of execution within the terms of California's amended death penalty statute, neither plaintiff has standing to challenge the constitutionality of execution by lethal gas and the plaintiffs' claims are not ripe for decision." *Fierro v. Terhune*, 147 F.3d 1158, 1160 (9th Cir. 1998)

In an excess of caution, appellant actually filed earlier than this authority requires, so his timing cannot be held against him.

By filing as early as he did, appellant was actually risking an argument that he had waived his claim. In *Campbell*, a Washington inmate was allowed to litigate an Eighth Amendment challenge on habeas over the State's objection that the claim was not ripe because Campbell could choose to be executed by lethal injection. *Campbell v. Wood*, 18 F.3d at 680-81. This Court held that the claim was ripe because "Campbell has consistently maintained that he will not exercise his power to choose. . . . His refusal to exercise the option of lethal injection ensures that Campbell's death warrant will be fulfilled by judicial hanging." *Id.* at 681. Since *Campbell*, the U.S. Supreme Court has held that an inmate who chooses his method of execution waives any Eighth

Amendment objection to that method. *Stewart v. LaGrand*, 526 U.S. 115, 119 (1999). Nothing in *LaGrand* indicates that it is limited to choices of the non-default method and that standing moot or affirmatively choosing the default method would allow an Eighth Amendment challenge. Arguably, an inmate who says in advance that he will not fill out the form is, in a sense, choosing lethal injection. By filing before the ten-day choice period had lapsed, appellant was risking an argument that he was waiving any objections to lethal objection by affirmatively choosing it.[7]

The district court abused its discretion by overstating the last minute nature of the proceedings. This is not the Kevin Cooper case where an unexhausted complaint was filed eight days before the scheduled execution, arguably to buy time for Cooper to litigate his successor claims involving DNA issues. The impact that Cooper's other claims had on counsel's ability to litigate the lethal injection claim was argued at the hearing on the preliminary injunction in *Cooper*. (ER 686, 688.) This Court upheld the district court's finding that "even though Cooper's action has the avowed purpose of addressing alleged deficiencies in the lethal injection protocol, the timing of Cooper's action suggests that an equally important purpose is to stay his execution to continue to pursue other claims." (ER 561, 739.) Because appellant has no successor petitions

[7] Of course, an inmate who refuses to fill out the form in the ten day window is also, in a sense, choosing lethal injection. This would mean that the inmate could never challenge the method of execution under the Eighth Amendment. Obviously, that cannot be true. *LaGrand* is the poorly reasoned consequence of the aftermath of *Fierro v. Gomez*, 77 F.3d 301, 306 (9th Cir. 1996), the case that held lethal gas unconstitutional. The Supreme Court remanded *Fierro* in light of California's decision to make lethal injection the default method, and this Court vacated the opinion. This left lethal gas a legal option in Arizona. The Supreme Court was obviously irritated at LaGrand for choosing, in a successor posture, a method of execution that he knew would be held unconstitutional by this Court.

pending, respondents could not and did not advance this argument here. Once again, *Cooper* is not a helpful model for this case.

The district court makes much of the January 19 execution date, but there was nothing magical about this date. After the California Supreme Court lifted the stay on November 22,[8] the Attorney General initially indicated that the State would not rush to superior court to seek a date and that it probably would seek a date in late January or early March to accommodate the schedules of various participants. Presumably in response to appellant's initiation of exhaustion proceedings and his motion for an expanded certificate of appealability on Claim 39, the State noticed the December 16 hearing on December 1. The State then initially indicated that it would seek a January 25 execution date but changed its mind and asked for January 19. While the State may have had the legal right to take these actions, this Court should not be blinded to the State's attempt to prejudice appellant by manufacturing an added sense of urgency in the new challenges that were confronting it.

Under Penal Code section 1227, the superior court could have set the execution as late as February 14, 2005. Appellant's state court attorneys argued that the court should do that, but the superior court acceded to the State's wishes. Having undertaken exhaustion proceedings so that a complaint could be filed, appellant

[8] The Court's lifting of the stay came as something of a surprise because appellant's petition for rehearing from the order denying certiorari was still pending in the U.S. Supreme Court, with an order not likely to issue until November 29.

obviously would have filed on December 20 even if the date had been set for February 14.

Appellant asked to have the motion for preliminary relief heard on December 23, 2004. (ER 21.) The district court assigned the case to Judge Fogel even though appellant's proposed schedule could not be accommodated because of the vacation schedules of Judge Fogel and the district court's staff attorney for death penalty matters. Thus, the idea that appellant knowingly and intentionally filed his complaint and litigated his motion for preliminary relief uncomfortably close to a known execution date is an illusion caused by circumstances beyond appellant's control.

In *Cooper*, the district court suggested that if the complaint had been filed three months earlier than it was, there would have been no problem. (ER 679.) Given that appellant began to exhaust in November when the possibility of a March execution date was on the table, appellant's case fits comfortably into that paradigm. Notably, even with its overstatement of the eleventh hour nature of the filing, the district court felt that a "more orderly process" was possible in this case. (ER 672.) Three months would not be necessary to vindicate appellant's rights. While it would be ideal to conduct discovery from other states regarding appellant's toxicology reports, this case could comfortably be litigated with a focus on evidence from California as this Court's decisions in *LaGrand v. Stewart*, 133 F.3d 1253, 1265 (9th Cir. 1998) and *Poland v. Stewart*, 117 F.3d 1094, 1104-05 (9th Cir. 1997), rightly or wrongly, suggest is appropriate. Appellant had already prepared a comprehensive request for documents,

all of which he would be entitled to with an appropriate protective order. Given that respondents would not be conducting discovery from appellant, once respondents had produced their documents, this case would probably be ready for summary judgment.[9]

Finally, the district court abused its discretion in holding that the timing of this complaint should factor into the decision to deny preliminary relief on appellant's First Amendment claim. Unlike in the Cooper litigation, respondents have made no attempt whatsoever to assert that pancuronium bromide plays a legitimate role in the execution process. Nor could they under this Court's precedents, for the reasons discussed below. Their refusal to excise pancuronium bromide from the protocol despite their tacit acknowledgment that it performs no legitimate function is evidence of their bad faith in administering it.

If respondents were planning to paint appellant's face like a clown while he was paralyzed but supposedly unconscious, it is inconceivable that this Court would say that appellant filed too late to have a full blown trial on such matters. A full blown trial would not be necessary. The administration of pancuronium bromide is on the same level as this indignity. If respondents persisted in frivolously digging in their heels on this issue, the matter could be resolved in appellant's favor by way of summary judgment very quickly.

[9] Given that respondent's expert, Dr. Dershwitz, assumed proper administration of the chemicals but did not testify that proper administration had occurred or could be ensured, it is unlikely that he would say anything new on that subject that might require him to be deposed.

C. Appellant Was Entitled to a Preliminary Injunction on His Eighth Amendment Claim Because He Showed That There is a Serious Risk That He Will Be Conscious During His Execution.

1. *Cooper* Does Not Control This Litigation

The district court stated that this Court's decision in *Cooper* is binding. (ER 672.) Exactly what it is binding on is not explained. The only thing this Court decided in *Cooper* was whether the district court abused its discretion in denying preliminary relief in light of Cooper's factual and legal presentation and the other equities in his case. Judge Browning emphasized this in his concurrence:

> "Appellate review of the grant or denial of preliminary injunctive relief requires consideration of the merits of the underlying issue, but it does not decide them. . . . We review for abuse of discretion the district court's decision to grant or deny a preliminary injunction or temporary restraining order. . . . 'Our review is limited and deferential.' . . . We determine only whether 'the district court employed the appropriate legal standards governing the issuance of a preliminary injunction, and correctly apprehended the law with respect to the issues underlying the litigation.' . . . Our review of the district court's merits decision -- if it is appealed -- will be more rigorous. . . . Neither the district court nor the parties should read today's decision as more than a preliminary assessment of the merits." (ER #.)

Thus, this Court is not bound by its decision in the Cooper case, nor was the district court.

Concern about inconsistent results does not justify blind adherence to *Cooper*. The Supreme Court's refusal to apply the bedrock principle of *stare decisis* in appropriate circumstances should persuade this Court that *Cooper* should not have been the starting and ending point of the discussion. "[W]hen governing decisions are

unworkable or are badly reasoned, 'this Court has never felt constrained to follow precedent.'" *United States v. Dixon*, 509 U.S. 688, 712 (1993). "[W]e think *stare decisis* cannot possibly be controlling when . . . the decision in question has been proved manifestly erroneous[.]" *United States v. Gaudin*, 515 U.S. 506, 521 (1995). "*Stare decisis* is not an inexorable command; rather, it 'is a principle of policy and not a mechanical formula of adherence to the latest decision.'" *Payne v. Tennessee*, 501 U.S. 808, 828 (1991), *quoting Helvering* v. *Hallock*, 309 U.S. 106, 119, 84 L. Ed. 604, 60 S. Ct. 444 (1940).

There is no embarrassment in reaching a decision contrary to *Cooper* or in acknowledging that *Cooper* may have been wrongly decided. Kevin Cooper is still alive and his lethal injection challenge can go forward on the merits if necessary. Consistency for its own sake does not reflect well on the system, particularly when the stakes are as high as they are here.

2. The District Court's Abandonment of Its Rationale in *Cooper*

Respondents and the district court assume that the starting point for analyzing the sufficiency of appellant's factual and legal showing must be the district court's decision in *Cooper*. That is transparently untrue.

In its order in *Cooper*, the district court cited two Ninth Circuit cases from Arizona, a California Supreme Court case, a Connecticut case and a Florida case. (ER 563.) None of the case authority that the district court cited in *Cooper* appears in the order appealed from, and for good reason. In his reply, appellant showed why none of

these cases controlled appellant's case—or should have controlled Cooper's. (ER 627-31.) Appellant also explained why, under *Campbell*, it was irrelevant that 37 states had adopted lethal injection. "The number of states using hanging is evidence of public perception, *but sheds no light on the actual pain that may or may not attend the practice*. We cannot conclude that judicial hanging is incompatible with evolving standards of decency simply because few states continue the practice." *Campbell v. Wood*, 18 F.3d at 682. The district court's abandonment of its former reasoning shows why *Cooper* does not control.

3. The District Court's Erroneous Reliance on the Reid Case.

Ignoring the wealth of new evidence and authority cited by appellant, the district court reached out to the one case that respondents bothered to cite, a district court case from Virginia, *Reid v. Johnson*, 333 F. Supp. 2d 543 (D.Va.2004). Citing *Reid*, the district court disposed of appellant's arguments that the evidence of problems revealed in California's execution logs was attributable to fatal inadequacies in the protocol and/or the qualifications and training of the personnel conducting the execution, stating that "the likelihood of such an error [in administration] occurring 'is so remote as to be nonexistent.'" *Reid v. Johnson,* 333 F. Supp. 2d at 551." (ER 674.)[10]

*Reid* does contain this language; however, the observation is incoherent in

[10] The district court's citation of *Reid* is ironic given that most of the cases that it relied on in *Cooper* held that the inmate's showing failed because he did not focus on what was happening in the state that intended to execute him.

the context of the decision. As appellant's counsel pointed out at argument (ER 725), the district court refused to consider evidence related to how the drugs were administered.

> "Throughout the proceedings, Reid's counsel attempted to adduce evidence regarding personnel, training, security, timing, equipment, and the potentiality for human error in the administration of the lethal injection. While this Court acknowledges that it is difficult to analyze the particular chemical mixture without reference to the other elements of the protocol mentioned above, permitting the inclusion of those factors would be tantamount to a challenge to lethal injection generally and place the case outside the boundaries of § 1983 and into the compass of § 2254. Consequently, the issue before this Court for purposes of a preliminary injunction, in the form of a stay of execution, is a narrow one—does the particular chemical recipe used by the Commonwealth of Virginia in the execution of Reid amount to cruel and unusual punishment[.]" *Id.* at 549.

Thus, using *Reid* to say there are no problems with how California conducts executions is akin to a cook, confronted with the four fallen cakes he's made, relying on the prize-winning recipe he used to prove he is a great baker.

*Reid*, of course, is wrong that examining the procedures under which lethal injection is conducted would turn the case into a habeas case. The process, qualifications and training of personnel are all part of the method of execution. Other cases have certainly recognized this.

In his reply, appellant discussed *State v. Webb*, 252 Conn. 128 (2000). Although he took no position on the constitutionality of Connecticut's methods, appellant noted that Connecticut appears to take much greater care to eliminate the

possibility of human error from the process.

According to *Webb*, Connecticut uses a manifold system, not a syringe system like California.

> "[S]tate officials conferred with officials of at least six other states that employed lethal injection. The state ultimately selected a manifold system for the administration of the agents. Although other states utilize a manual process, which requires that each chemical agent be administered individually through separate syringes, the task force selected the manifold system because that system minimized the potential for problems associated with the administration of the agents. The manifold locks the agents in a particular order and, as a result, eliminates the risk of inserting a syringe in an improper sequence. [Corrections Commissioner] Matos also described the type of catheter selected by the state, which was designed and intended for delivering fluids sequentially and rapidly." *State v. Webb*, 252 Conn. at 134.

In addition to this safeguard, Connecticut provided for professional oversight at certain critical stages. Intravenous lines would be established by "[a] person or persons, properly trained to the satisfaction of a Connecticut licensed and practicing physician[.]" *Ibid.*. No such requirement appears in California's Procedure 770. A psychologist "screened department employees who would participate in the procedure[.]" Id. at 133. Again, no such safeguard appears in Procedure 770. The Court in *Webb* relied on the training standards and the use of the manifold system in rejecting the defendant's argument that the procedure entailed serious risks of malfunctioning. *Id.* at 142-44. Such evidence obviously was not considered in *Reid*.

In *Abdur'Rahman v. Bredesen*, 2004 Tenn.App.LEXIS 643 (February 23, 2004), the court held that "the ultimate determination regarding whether Tennessee's

three-drug protocol causes unnecessary physical pain or psychological suffering depends on the efficacy of the injection of Sodium Pentothal that precedes the injections of Pavulon and potassium chloride." *Id.* at *63.[11] Focusing on administration, the court observed that "the experience and training of the persons participating in an execution by lethal injection is a relevant consideration when determining whether the protocol violates the prohibitions against cruel and unusual punishments[.]" *Id.* at *37. Additionally, "evidence regarding the manner in which the Department obtains and prepares the Sodium Pentothal is relevant" to the Eighth Amendment claim.

The evidence revealed that the various syringes are numbered and color coded. *Id.* at *16. A closed circuit television camera is trained on both injection sites to make sure that nothing happens to the catheters after they are inserted. *Id.* at *17. The Court upheld the process in light of the "intensive training that the persons involved in the execution must undergo" and the "practice sessions designed to minimize the risk of mistake in the stressful circumstances of an execution." *Id.* at *66, 68.

Other than that California uses numbered syringes (ER #), it cannot be said that any of the supposed safeguards identified in *Webb* and *Abdur'Rahman* exist in California. The district court committed clear legal error in relying on *Reid* to dispose of appellant's concerns about administration.

[11] At the time *Abdur'Rahman* was decided, Tennessee had conducted one apparently successful lethal injection execution. *Id.* at *64. Thus, like most of the cases in *Cooper*, the plaintiff's claim had an inherently speculative cast that appellant's does not given the problems that have occurred in California executions.

4. General Eighth Amendment Principles

The Eighth Amendment forbids the infliction of unnecessary pain in carrying out a death sentence. *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463 (1947) (Reed, J. opinion); *Fierro v. Gomez*, 865 F.Supp. 1387, 1413 (N.D. Cal. 1994). "Punishments are cruel when they involve...a lingering death." *In re Kemmler*, 136 U.S. 436, 447 (1890). A punishment offends the Constitution if it involves foreseeable infliction of suffering. *Furman v. Georgia*, 408 U.S. 238, 273 (1973) (citing *Resweber*, *supra* at 463).

The United States Supreme Court, in determining whether a method of execution violates the Eighth Amendment, examines whether the method of execution: (1) comports with contemporary norms and standards of society; (2) offends the dignity of the person and society; (3) inflicts unnecessary physical pain; and (4) inflicts unnecessary psychological suffering. *See Weems v. United States*, 217 U.S. 349 (1910); *In re Kemmler*, 136 U.S. at 447. *See also*, *Campbell v. Wood*, 18 F.3d 662, 682 (9th Cir. 1994) (stating that method of execution claims should focus on amount of pain involved in the procedure, not public acceptance of the procedure).

There is no reason that lethal injection, however conducted, must be forever enshrined as a humane and constitutional method of execution. The United States Supreme Court has observed that certain methods which were once considered humane have later been declared unconstitutional. *See Wilkerson v. Utah*, 99 U.S. 130, 135-36 (1879) (citing drawing and quartering, and public dissection as examples of

unnecessary cruelty which violated the Eighth Amendment); *In re Kemmler*, 136 U.S. at 446 (noting that burning at the stake, crucifixion and breaking on the wheel are unconstitutional methods of execution). This Court has declared that execution by lethal gas is cruel and unusual punishment. *Fierro*, 77 F.3d at 306. Many years of "history and moral development," *Gomez v. United States District Court*, 503 U.S. 653, 654-55 (1991) (Stevens, J. dissenting,) had changed public opinion that the gas chamber was a humane method of execution. As "the concepts of dignity and civility evolve, so too do the limits of what is considered cruel and unusual." *Fierro*, 865 F.Supp. at 1409. The change in public opinion about lethal gas mostly came about because of the increased availability of information concerning the application of the gas chamber and the suffering inflicted upon condemned prisoners. This Court has acknowledged that subjecting lethal injection to the same scrutiny could lead to its being abolished. *California First Amendment Coalition v. Woodford*, 2000 U.S. Dist. LEXIS 22189 (N.D. Cal. July 26, 2000) at *26-28.

5. Appellant Established His Entitlement to Preliminary Relief.

Appellant demonstrated that the California Department of Corrections lethal injection protocol, as stated in Procedure 770 violates the Eighth Amendment because it will subject appellant Beardslee to an unreasonable and unacceptable risk of unnecessary physical and psychological pain, and involves execution procedures that offend contemporary norms and standards of society.

Respondents contested this point but did not dispute the remaining prongs of the *Martin* test: that without injunctive relief, appellant would suffer irreparable injury by being executed in a cruel and unusual manner, that the balance of hardships favors appellant because if he were ultimately unsuccessful on the merits, the State could proceed with his execution, and that granting the injunction to examine the constitutionality of California's lethal injection procedure serves the public interest.

Appellant bore his burden of showing probability of success on the merits and/or that he had a serious case. As set out in the statement of facts, 1) Appellant used expert testimony and available California execution logs to prove that serious problems have occurred in prior California executions; 2) Appellant showed that Procedure 770 lacks sufficient guidance and qualification requirements for personnel involved in the execution; 3) Appellant used toxicology reports from other states to show, according to the assumptions of respondents' own expert, that serious problems have occurred in lethal injections in other states; 4) Appellant introduced newspaper accounts of problems with lethal injections that have occurred in other states; and 5) Appellant presented evidence that most of California's lethal injection protocol, as it is presently understood, would be unacceptable for the euthanization of animals.

Respondent proffered nothing in return. Respondent's expert never addressed the execution logs, and his opinion about the certain efficacy of five grams of sodium thiopental obviously assumes proper administration and effective delivery of the drug. (ER 236.) He does opine that RN's and LVN's are competent in proper IV

insertion techniques, apparently regardless of the circumstances.[12] (ER 240-41.) He does not address who is preparing and pushing the chemicals, their qualifications, training and psychological suitability for the job, or address any other questionable aspect of the process. Further, the fact that RN's and LVN's do the insertions does not ensure that this aspect of the process meets constitutional standards. Anyone who has ever had blood drawn or has sat with someone during a long hospital stay knows that even trained technicians do not have a very high batting average when it comes to hitting the vein and having the needle stay in the vein.[13]

Citing *Reid v. Johnson*, 333 F. Supp. 2d 543 (D.Va. 2004), the district court accepted respondents' argument that the toxicology reports are not probative without more information about when and how they were conducted. This is remarkable given that it was respondents' expert in *Cooper*, Dr. Dershwitz, who first suggested, without elaboration, that thiopental levels in blood were relevant.

> "From my pharmacokinetic analysis I have generated a graph, attached as Exhibit B. This pharmacokinetic graph shows the concentration of thiopental in the blood in an average man as a function of time . . . From my pharmacodynamic analysis, I have generated a graph, attached as Exhibit C. This pharmacodynamic graph shows the probability that an average man will be conscious as a function of the blood concentration of thiopental. In other words, the graph shows the likelihood of consciousness in the presence of varying blood concentrations of thiopental." (ER 237.)

[12] The Attorney General must have told Dr. Dershwitz that RN's and LVN's perform the IV insertions. This is not spelled out in Procedure 770.

[13] At the hearing, the Attorney General refused to concede that accidents could occur in the process. (ER 706.)

Respondents conveniently ignore that when Dr. Dershwitz was informed of Kentucky inmate Edward Harper's thiopental levels as revealed in his post-mortem toxicology reports, he called this evidence "potentially troubling," noting that "the blood level should be a lot higher[.]" mg/l. (ER 225.) Presumably, if Defendants and Dr. Dershwitz had something to say about the methodology of analyzing thiopental levels, he would have said it in *Cooper*, and he would say it here.

Respondents ignore that the Kentucky data in the Harper case, which Dr. Dershwitz found troubling, shows the levels in blood drawn from three different parts of the body. (ER 137, 147-49.) The North Carolina documents show what day the blood was collected. (ER 158, 160, 162, 164.) The Arizona documents show "troubling" cases where the blood was drawn right after the execution (ER 299, 311 (Brewer execution)) and the morning after the execution (ER 300, 373 (Ceja execution)). Additionally, in many of the Arizona reports, the DOCTORS performing the toxicology screens from MedTox state: "Pentobarbital concentrations[14] as high as 50 mg/ml may be required to induce therapeutic coma, apparently suggesting concern that the blood levels were too low. (ER 289, 303, 304, 307.) It is noteworthy that Arizona, apparently, uses the SAME amount of thiopental—5 grams—as California, yet, in numerous cases, little if any thiopental was detected in the blood. (ER 289, 299, 301, 303, 304, 307.)

[14] The reports say that thiopental metabolizes to pentobarbital.

The district court abused its discretion in discounting appellant's argument about contemporary veterinary standards. Given the consistency in the trend against the use of neuromuscular blocking agents (including pancuronium bromide) in the euthanasia of animals, and the American Veterinary Medical Associations' express condemnation against such practice, respondents' use of pancuronium bromide during lethal injections is outside the bounds of evolving standards of decency.

The Attorney General argued at the hearing in *Cooper* that it was apples and oranges, and the district court appears to have accepted that. (ER 687.) The goal in animal euthanasia may be an absolutely painless death, something the constitution does not require in capital punishment; however, as *Abdur'Rahman* recognized and respondents conceded, the consequence of failure in California's protocol is not "some pain," it is torture. The fact that the veterinary community has acknowledged this but California's corrections community has not is shameful. The familiar phrase, "You wouldn't do that to a dog" has particular resonance here.

### D. Appellant Was Entitled To A Preliminary Injunction On His First Amendment Claim Because The Administration Of Pancuronium Bromide Will Violate His First Amendment Right To Free Speech.

In Justice Stevens's dissent in *Gomez v. United States District Court,* 503 U.S. 653, he urged the Court to reach the merits of Robert Alton Harris's challenge to lethal gas in light of the wealth of clinical evidence that the procedure was unnecessarily cruel. The evidence was not all clinical. "Eyewitness descriptions of executions by

cyanide gas lend depth to these clinical accounts." *Id.* at 655. Justice Stevens quoted at an eyewitness description of a harrowing lethal gas execution.

> "'When the fumes enveloped Don's head he took a quick breath. A few seconds later he again looked in my direction. His face was red and contorted as if he were attempting to fight through tremendous pain. His mouth was pursed shut and his jaw was clenched tight. Don then took several more quick gulps of the fumes.' 'At this point Don's body started convulsing violently . . . . His face and body turned a deep red and the veins in his temple and neck began to bulge until I thought they might explode.'" *Id.* at 655-56.

Justice Stevens observed that in response to such evidence, the Arizona Attorney General had recommended that Arizona abandon the gas chamber. *Id.* at 655-56. This kind of good faith attempt at humane execution reform cannot happen in a lethal injection state that uses pancuronium bromide to paralyze an inmate and keep him silent, anymore than Arizona's attempt at reform could have happened if it conducted its lethal gas executions in a darkened gas chamber.

The district court held that because appellant had not shown a sufficient likelihood that the execution process will fail and that he will have something to complain about, his First Amendment rights were not triggered. Neither respondents nor the district court cited any authority for this proposition, and for good reason. It clearly is not the law. In *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8-9 (1986), the Supreme Court held that the media plaintiffs had a First Amendment right of access to a preliminary hearing transcript even though the trial court had described the transcript as "neither 'inflammatory' nor 'exciting'" *Id.* at 5. It is also difficult to

imagine a state university's prior restraint against a professor's publishing his controversial views being upheld because the chancellor is convinced the man has nothing interesting to say. Regardless of the odds of a mishap occurring—and appellant has shown that the risk is significant—appellant would be entitled to communicate to the witnesses and, by extension, the public at large, that the execution protocol has not functioned as intended *in his particular case* and that he was being tortured. The chemical veil put in place by pancuronium bromide unconstitutionally prevents him from doing so.

A hearer, of course, implies a speaker. This Court has already held that the public and the media have a First Amendment right to view the execution process. The critical relationship between the First Amendment and the Eighth Amendment was recognized in *California First Amendment Coalition v. Woodford*, 2000 U.S. Dist. LEXIS 22189 (N.D. Cal. July 26, 2000) ("*CFAC I*") and *California First Amendment Coalition v. Woodford*, 299 F.3d 868 (9th Cir. 2002) ("*CFAC II*") (collectively, the "*First Amendment Coalition case*"). In *CFAC I*, the Honorable Vaughn Walker held that respondents violated the First Amendment rights of the public and the press by drawing a curtain and not allowing the witnesses to view the lethal injection process until after the prisoner had been strapped into place and intravenous shunts inserted. Judge Walker held that the witnesses should be allowed to witness the entire proceeding from the time the prisoner was first led into the execution room. This Court affirmed the judgment in *CFAC II*.

Judge Walker emphasized that enforcement of the Eighth Amendment cannot exist without the protections of the First Amendment:

> "The public's perception of the amount of suffering endured by the condemned and the duration of the execution is necessary in determining whether a particular execution protocol is acceptable under [the] evolutionary standard. Courts evaluating the constitutionality of methods of execution rely in part on eyewitness testimony. . . . This eyewitness testimony is crucial to the review of execution protocols which the courts frequently undertake. While courts rarely invalidate a state's execution procedure, ongoing challenges and threats of challenge motivate states to modify their procedures. For example, lethal gas and electrocution have been vigorously challenged in recent years. In response to these challenges, most states have either moved to the use of lethal injection or make it available as an alternative to gas, electrocution or hanging. . . . Although lethal injection is generally regarded as the most humane and painless execution method presently available, technology and society's perceptions may evolve in the future. If there are serious difficulties in administering lethal injections, society may cease to view it as an acceptable means of execution and support a return to lethal gas or electrocution or push for development of another execution method. Or a majority of the public may decide that no method of execution is acceptable. Eyewitness testimony is crucial to the public's evaluation of how this extreme punishment is performed. . . . Demonstrating the need for witnesses at executions is the fact that although there had only been five executions by means of lethal injection in California by the time of trial, the execution record of one of these individuals had inexplicably vanished." *CFAC I*, 2000 U.S. Dist. LEXIS 22189 at **24-26.

This Court echoed these policy concerns in affirming.

> "Independent public scrutiny—made possible by the public and media witnesses to an execution—plays a significant role in the proper functioning of capital punishment. . . . To determine whether lethal injection executions are fairly and humanely administered, or whether they ever can be, citizens must have reliable information about the "initial procedures," which are invasive, possibly painful and may give rise to serious complications." *CFAC II*, 299 F.3d at 876.

This Court further recognized that if First Amendment rights are not protected, respondents will have a monopoly on framing the issues and defining the debate around lethal injection.

> "An informed public debate is the main purpose for granting a right of access to governmental proceedings. Prison officials simply do not have the same incentives to describe fully the potential shortcomings of lethal injection executions. As Warden Calderon's memo demonstrates, a prison official's perception of the execution process may be vastly different—and markedly less critical—than that of the public." *Id.* at 884.

Evidence from the First Amendment Coalition case counseled in favor of a finding that pancuronium bromide is intended to mask the horror of a "botched" execution and prevent Mr. Beardslee from communicating that he is being tortured. As Judge Walker found,

> "In a memorandum written to the Department of Corrections administration, then-Warden Arthur Calderon stated that one reason respondents oppose the same degree of media access for lethal injection executions as in executions by lethal gas is that in the event of a hostile and combative inmate, it will be necessary to use additional force and staff to subdue, escort and secure the inmate to the gurney. It is important that we are perceived as using only the minimal amount of force necessary to accomplish the task. In reality, it may take a great deal of force. This would most certainly be misinterpreted by the media and inmate invited witnesses who don't appreciate the situation we are faced with." *CFAC I* 2000 U.S. Dist. LEXIS 22189 at *11.

Judge Walker found that the desire to control the public debate was not a legitimate penological purpose or security concern. *Id.* at *16. The Ninth Circuit affirmed, upholding Judge Walker's finding that "the procedure was motivated at least in part by a desire to conceal the harsh reality of executions from the public." *CFAC II*, 299 F.3d at 880. Respondents did not take issue with this characterization of their motivation for secrecy. The fact that respondents paradoxically assert their right to mask problems that they insist cannot occur, whether by design or by accident, should

convince this Court that pancuronium bromide has no legitimate place in a humane execution.

Appellant retained his First Amendment rights even though he was challenging an aspect of his execution. "Prison walls do not form a barrier separating prison inmates from the protections of the Constitution." *Turner v. Saffley*, 482 U.S. 78, 84 (1987). Nonetheless, because of the unique characteristics of the prison setting, restrictions on inmates' constitutional rights are not subject to strict scrutiny. A restriction on inmates' constitutional rights is valid "if it is reasonably related to legitimate penological interests." *Id.* at 89. A court must consider 1) whether there is a valid rational connection between the regulation and the assertedly legitimate penological goal, 2) whether the inmate has alternate means of exercising the right at issue, 3) the impact that exercise of the right has on the institution, and 4) the availability of alternatives to the restriction. *Id.* at 89-91. When First Amendment rights are restricted, the legitimacy of the government's stated objective depends on whether the restriction is content neutral. *Id.* at 90. A restriction will not be upheld if it is an "exaggerated response" to the otherwise legitimate penological goals. *Id.* at 87, *Pell v. Procunier*, 417 U.S. 817, 827 (1974).

Deference to the judgment of prison administrators "does not mean abdication" of judgment. *Walker v. Sumner*, 917 F.2d 382, 385 (9th Cir. 1989). "[P]rison authorities cannot avoid scrutiny under Turner by reflexive, rote assertions." *Armstrong v. Davis*, 275 F.3d 849, 874 (9th Cir. 2001), *cert. denied*, 537 U.S. 812

(2002). Respondents can not salvage unconstitutional conduct by the "piling of conjecture upon conjecture[.]" *Reed v. Faulkner*, 842 F.2d 960, 963 (7th Cir. 1988).

> "Prison authorities cannot rely on general or conclusory assertions to support their policies. Rather, they must first identify the specific penological interests involved and then demonstrate both that those specific interests are the actual bases for their policies and that the policies are reasonably related to the furtherance of the identified interests. An evidentiary showing is required as to each point." *Id.* at 386.

Thus, relief should not be denied based on speculative security concerns. See *Rich v. Woodford*, 210 F.3d 961, 963 (9th Cir. 2000) (Reinhardt, J., dissenting) (criticizing "transparent weakness of the state's purported concerns.") Appellant addressed the *Turner* and *Martin* factors seriatim in his motion for preliminary relief. (ER #.)

Respondents ignored almost everything appellant said. They did not dispute that appellant will have no reasonable alternative means of communicating about the execution because he will be dead afterwards,[15] that not having to prepare the three syringes of pancuronium bromide will have no impact on the institution, and that consideration of available alternatives to achieve an improper purpose has no place in this discussion. Respondents also did not contest appellant's showing under *Martin*, i.e., that appellant will suffer irreparable injury without an injunction because he will only be executed once, that the balance of hardships favor him and that this injunction

[15] As Judge Walker recognized, "The condemned inmate, the only non-government witness to any Eighth and Fourteenth Amendment violations that might occur prior to the observation permitted by Procedure 770, cannot communicate with the media or the public at the conclusion of his execution." *California First Amendment Coalition v. Woodford*, *supra*, at **22-23.

validates the public interest recognized in the *First Amendment Coalition* case. Respondents' concession of these obvious propositions is not surprising.

What is surprising, and what should convince this Court that the same hide-the-ball bad faith identified in the *First Amendment Coalition* case is at work here, is that respondents made absolutely no attempt to show that administering pancuronium bromide has any legitimate penological purpose. Indeed, by acknowledging that if the procedure does not function as intended, appellant will suffer "torturous pain," respondents even conceded that the administration of pancuronium bromide will not have a content-neutral effect on appellant's speech. (ER #.) *Unlike in Cooper*, respondents made no attempt to justify the use of pancuronium bromide on the grounds that it will play a critical role in causing Mr. Beardslee's death. Procedure 770 does not state any such thing. Potassium chloride, which is administered last and stops the heart, is, clearly and logically, the substance that causes death. (ER 66.) *Unlike* in *Cooper*, respondents also did not urge that the drug is properly administered so that witnesses will not be confused by involuntary muscle twitching, no doubt because they realized that such an argument was barred by the *First Amendment Coalition* case.

Respondents have abandoned their position in *Cooper* that pancuronium bromide is properly administered because it prevents the condemned person from breathing and would by itself prove fatal. If an inmate is not properly sedated by the thiopental, he would be paralyzed while experiencing the pain and terror of suffocation. This Court has twice stated its views that death by asphyxiation is cruel and unusual

punishment. In *Campbell v. Wood*, 18 F.3d 662 (9th Cir. 1994), this Court rejected an Eighth Amendment challenge to Washington's hanging protocol. This Court identified "the risks of death by asphyxiation and decapitation" as implicating Eighth Amendment concerns. *Id.* at 683. The evidence at the district court had shown that if the hanging did not result in trauma to the neck structures and spinal cord, resulting in rapid unconsciousness, the hanged man would be asphyxiated and would be conscious for one to two minutes. *Id.* at 684. This Court upheld the district court's finding that Washington's hanging protocol did not violate the Eighth Amendment because the protocol had minimized the risk of asphyxiation as much as possible. Id. at 687 & n. 17. In *Fierro v. Gomez*, 77 F.3d at 308, the Ninth Circuit, stating that "Campbell had suggested that asphyxiation would be an impermissibly cruel method of execution[,]" held that execution by lethal gas was cruel and unusual punishment because the condemned person would be conscious for one to several minutes while he suffocated. In light of these cases, pancuronium bromide's role in the execution process cannot be used to justify the infringement on Mr. Beardslee's First Amendment rights.

Appellant's discussion of *Campbell* and *Fierro* on this point distinguishes his showing from Cooper's. In *Cooper I*, the district court, discussing the propriety of administering the paralyzing neurotoxin pancuronium bromide (Pavulon), ruled:

> "Nor has Plaintiff met his burden of showing that the use of Pavulon is inhumane and unnecessary. According to Defendants and their experts, a principal purpose of Pavulon is to stop an inmate's breathing. Plaintiff has not articulated a compelling argument that this is not a legitimate state interest in the context of an execution." *Cooper I* at *9.

Appellant did articulate a compelling argument here. While Cooper complained about the horrors of pancuronium bromide, he never cited *Campbell* or *Fierro* or directed the district court's attention to the proposition that this Court considers prolonged asphyxiation to be an Eighth Amendment violation.

Respondents did not argue that it had a legitimate penological interest in preventing appellant's speech. Nor could they. Unlike other federal constitutional rights, which must be balanced against security and other concerns when applied to prisoners, violations of the Eighth Amendment can never be justified. "The Eighth Amendment is not a 'maybe' or 'sometimes' proposition." *Toussaint v. McCarthy*, 801 F.2d 1080, 1093 (9th Cir. 1986), *cert. denied*, 107 S.Ct. 2462 (1987). The principle that violations of the Eighth Amendment can never be countenanced would be meaningless if prison officials could conceal them by restricting inmates' First Amendment rights. Respondents also did not dispute that appellant has a First Amendment right to communicate about breakdowns in his procedure, regardless of whether the breakdown rises to the level of an Eighth Amendment violation. This was made clear in *the First Amendment Coalition* case, where the record established that Respondents imposed restrictions on the viewing of the lethal injection process to minimize the risk that the witnesses would see unpleasant things that might make them critical of the process.

Appellant was entitled to injunctive relief to express himself and vindicate the policies at the heart of this Court's decision in the *First Amendment Coalition* case. Even if appellant was required to make some showing that there was a realistic

possibility he would have something interesting to say, he more than discharged his burden.

## VII. CONCLUSION

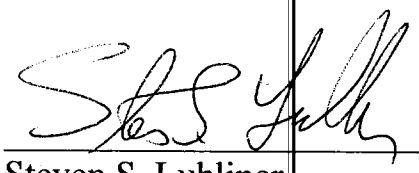
For the foregoing reasons, the district court's order denying preliminary relief should be reversed. Appellant is entitled to a preliminary injunction so that both his Eighth Amendment claim and his First Amendment claim may be heard on the merits.

## VIII. STATEMENT OF RELATED CASES

The mandate is currently stayed in Beardslee v. Woodford, 01-99007 to allow a petition for writ of certiorari from this Court's most recent decision.

DATED: January 10, 2004

Respectfully submitted:

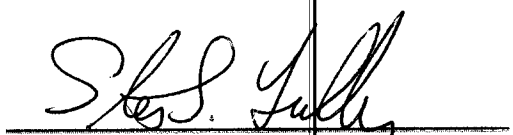


Steven S. Lubliner
Attorney for Donald Beardslee

CERTIFICATE OF COMPLIANCE (Circuit Rules 32-1, 32-4)

Pursuant to Ninth Circuit Rules 32-1, I hereby certify that the foregoing brief is produced in a proportional font (Times New Roman) of 14 point type and utilizes double line spacing, except in footnotes and extended quotations which are single-spaced. I further certify that, according to the word count of the word processing system used to prepare the brief, the brief includes 13,973 words (exclusive of the table of contents, the table of authorities, the proof of service and this certificate).

Dated: January 11, 2005



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## PROOF OF SERVICE

I, Steven S. Lubliner, certify and declare under penalty of perjury that I: am a citizen of the United States; am over the age of 18 years; am in practice at the address indicated; am a member of the State Bar of California and the Bar of this Court; am not a party to or interested in the cause entitled upon the document to which this Proof of Service is affixed; and that I served a true and correct copy of the following document(s) in the manner indicated below:

**APPELLANT'S OPENING BRIEF**

**APPELLANT'S EXCERPTS OF RECORD (3 volumes)**

**REQUEST FOR ARGUMENT AND DECISION BY MERITS PANEL**

**EMERGENCY MOTION FOR STAY OF EXECUTION**

() by today depositing, at Petaluma, California, the said document(s) in the United States mail in a sealed envelope, with first-class postage thereon fully prepaid (and/or):

() via facsimile machine, pursuant to California Rules of Court, rule 2008. The facsimile machine I used complied with Rule 2003, and no error was reported by the machine. The phone number for the sending machine is (707) 789-0515. Pursuant to Rule 2008(e)(4), I caused the machine to print a record of the transmission, a copy of which is attached to this declaration.

(x) by today personally delivering the said document(s) to the person(s) indicated below in a manner provided by law, by leaving the said document(s) at the office(s) or usual place(s) of business, during usual business hours, of the said person(s) with a clerk or other person who was apparently in charge thereof and at least 18 years of age, whom I informed of the contents.

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Executed in Petaluma, California on January 11, 2005